FILE COPY

IN THE

Supreme Court of the United States

October Term, 1958.

No. 223

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner,

v.

EDGAR A. McGINNES, District Director of Internal Revenue, Philadelphia

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
Respondent,

and

SEABOARD SURETY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No.

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner,

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, PHILADELPHIA

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
Respondent,

and

SEABOARD SURETY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW.

The opinions of the Court of Appeals, including its opinion on denial of petition for rehearing, have not yet been reported, and are printed in the Appendix hereto.

The opinion of the District Court is reported at 169 Fed. Supp. 580 (E. D. Pa. 1958). The opinion of the District Court is contained in the appendix record as printed for the use of the Court of Appeals, of which nine (9) copies have been filed herewith, under the provisions of Rule 21.

The District Court (Kirkpatrick, D. J.) held that it had jurisdiction of petitioner's suit to enjoin the Federal District Director of Internal Revenue from paying to a defrauder or its assignee, in the form of a federal tax refund, a fund belonging to petitioner, the Pennsylvania Turnpike Commission. The defrauding corporation, whose president has been convicted of conspiracy to defraud and obtaining money by false pretenses from the Commission, obtained possession of the money by fraud, used it to pay the income taxes on the money so obtained, and then applied for the refund which the defendant District Director was about to make. Under Pennsylvania law, petitioner has equitable title to the fund. The District Director did not contest jurisdiction and did not appeal. The defrauding corporation filed the motion to dismiss the complaint, before taking testimony, and with the assignee, appealed. The Court of Appeals (McLaughlin, C. J., Hastie, C. J., Morrill, D. J.) reversed, directing dismissal of the action for want of jurisdiction, and thereafter denied a petition for a rehearing. Circuit Judge McLaughlin dissented in the Court of Appeals, both from its original decision and its denial of a rehearing. In his dissent upon denial of a rehearing, Judge McLaughlin said:

> "In the face of the impressive reasons marshaled by plaintiff-appellee in urging our rehearing of this appeal, it is not possible for me to fulfill my responsibility in this case by merely voting for rehearing.
>
> . . . .
>
> "As a matter of court self respect before we permit the unbelievable act of turning over $900,000, alleged to be the property of the Pennsylvania Turnpike Commission, to the wrongdoer whose fraud against the

Commission created the entire present situation, our full court should at least carefully scrutinize the facts and law involved. If, because of some suggested lack of formalism in its procedure, the State Commission is to be barred by us from the one real chance of recovering its property the decision should be that of the court en banc."

JURISDICTION.

The judgment of the Court of Appeals is dated and was entered on June 8, 1959. A petition for rehearing was denied on June 26, 1959. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED FOR REVIEW.

Did the United States District Court have jurisdiction, pending a determination of petitioner's right to the fund, of a suit to enjoin the District Director of Internal Revenue at the suit of petitioner, Pennsylvania Turnpike Commission, an agency of the Commonwealth of Pennsylvania, from paying to a defrauder, respondent, Manu-Mine Research and Development Company or its assignee, respondent, Seaboard Surety Company, a fund in excess of $900,000 belonging to petitioner and fraudulently obtained by respondent, Manu-Mine, which was then used by Manu-Mine to pay its 1955 income tax and is now about to be refunded to Manu-Mine by the District Director?

STATUTES INVOLVED.

The District Court held that it had jurisdiction under the Act of June 25, 1948 c. 646, 62 Stat. 974, 28 U. S. C. Section 2463, which provides that: "All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Petitioner also contended that the District Court had jurisdiction under the Act of June 25, 1948 c. 646, 62 Stat. 932; 28 U. S. C. Section 1340, which provides that: "The District Courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the customs court."

STATEMENT OF THE CASE.

Petitioner, Pennsylvania Turnpike Commission, brought this suit to enjoin the District Director of Internal Revenue in Philadelphia from paying to respondent, Manu-Mine Research and Development Company, or its assignee, respondent, Seaboard Surety Company, a tax refund of about $900,000 derived from funds possession of which is alleged to have been fraudulently obtained by Manu-Mine from petitioner. The complaint alleged that in 1956 Manu-Mine paid more than $1,000,000 on its 1955 federal income tax, using for that purpose money obtained by fraud from petitioner, and that the funds so paid were and are petitioner's property and did not belong and have not rightfully belonged to Manu-Mine. The tax payment was made to defendant McGinnes, District Director of Internal Revenue in Philadelphia. Thereafter Manu-Mine or its assignee, Seaboard, applied to McGinnes for a refund of such tax payment in the amount of about $900,000. McGinnes was about to allow the claim for refund and to direct its payment to Manu-Mine or Seaboard. Petitioner notified McGinnes of its claim to the fund but despite the notification, McGinnes refused to recognize petitioner's claim and refused to withhold payment of the fund pending determination of petitioner's claim.

The prayer for relief sought an injunction restraining McGinnes from making the refund payment to Manu-Mine and an order, directing him to pay over the fund to petitioner, upon a determination that it belonged to petitioner.

In the District Court, Manu-Mine moved to dismiss for lack of jurisdiction and failure to state a claim on which relief could be granted. Seaboard moved to dismiss only for failure to state a claim on which relief could be granted. McGinnes filed an answer in which he did not challenge the District Court's jurisdiction. Since filing of the suit he has agreed not to make any payment pending a hearing.

The District Court, in an opinion by Judge Kirkpatrick, held that it had jurisdiction under 28 U. S. C. Section 2463, and also held that the complaint did state a claim upon which relief could be granted. The Court of Appeals allowed an interlocutory appeal under 28 U. S. C. Section 1292(b), as amended by the Act of September 2, 1958, 72 Stat. 1770. In an opinion filed June 8, 1959, the Court of Appeals held that the District Court did not have jurisdiction and reversed, with direction to dismiss the complaint, for want of jurisdiction. The Court consisted of Circuit Judges McLaughlin and Hastie and District Judge Morrill. Judge McLaughlin dissented.

Petitioner applied for a rehearing and on June 26, 1959 the petition was denied, again with a dissent by Judge McLaughlin. In this dissent, Judge McLaughlin wrote the following:

> "In the face of the impressive reasons marshaled by plaintiff-appellee in urging our rehearing of this appeal, it is not possible for me to fulfill my responsibility in this case by merely voting for rehearing. . . .
>
> "As a matter of court self respect before we permit the unbelievable act of turning over $900,000, alleged to be the property of the Pennsylvania Turnpike Commission, to the wrongdoer whose fraud against the Commission created the entire present situation, our full court should at least carefully scrutinize the facts and law involved. If, because of some suggested lack of formalism in its procedure,

the State Commission is to be barred by us from the one real chance of recovering its property the decision should be that of the court en banc."

The District Court had jurisdiction under 28 U. S. C. Sections 1340 and 2463, quoted above.

REASONS FOR GRANTING THE WRIT.

This case involves an important question of federal jurisdiction in the administration of the federal revenue laws and suits against the Federal District Director of Internal Revenue, which has not been, but should be, settled by this Court. In *Commissioner of Internal Revenue v. Wilcox*, 327 U. S. 404 (1946) and *Rutkin v. United States*, 343 U. S. 130 (1952), this Court considered the taxability to the wrongdoer of money obtained by embezzlement and extortion respectively. The claim of the victim to recover the funds in each case was not before the Court. In the present case, the victim of the fraud seeks to recover the funds to the extent that they are actually being refunded by the District Director of Internal Revenue, and has brought its suit in the federal district court, certainly the logical place in which to sue the District Director on such a claim. Yet, the Court of Appeals has held, over the vigorous dissent of Judge McLaughlin, that the petitioner has no recourse in the federal court to prevent return of the fund by the District Director to the wrongdoer and to obtain return of its own money. To say, as Judge Hastie does, in his opinion denying the rehearing in the Court of Appeals, that: "This, of course, leaves the Turnpike Commission entirely free to invoke the equitable powers of the state courts in an effort to restrain Manu-Mine from disposing of any tax refund it may collect" is of little solace, since compliance with an injunction by one who is already a wrongdoer, cannot be presumed, especially where such a substantial sum of money is involved.

I.

The District Court Had Jurisdiction Under 28 U. S. C. Section 1340.

This is clearly a case arising under the revenue laws of the United States so as to confer jurisdiction on the District Court under 28 U. S. C. Section 1340. Petitioner's claim involves the official duty of the District Director of Internal Revenue to deal with refund claims, delegated to him by the Commissioner of Internal Revenue within the scope of the authority granted under the Internal Revenue Code, 26 U. S. C. Section 6402. Under the allegations of the complaint, petitioner is the owner, by operation of law, of the fund to be paid over by the Director. See *Houston v. Ormes*, 252 U. S. 469 (1920). Petitioner's request to the District Director to withhold payment of the fund to the wrongdoer has been refused though it is within the scope of the official duties of the District Director to return to its rightful owner property with which the tax of another has been paid. *Stuart v. Chinese Chamber of Commerce of Phoenix*, 168 F. 2d 709 (9th Cir. 1948).

Such a suit in the federal district court against the District Director, like an ordinary refund suit, is maintainable on the theory of money had and received and ". . . in such suits, the plaintiff may recover only such money as he is in equity entitled to recover, and as defendant is not entitled to retain." *Perry v. Allen*, 239 F. 2d 107, 112 (5th Cir. 1956). The District Court traditionally has jurisdiction of refund suits against the District Director, *Flora v. United States*, 357 U. S. 63 (1958). The rule should be no different when the plaintiff is equitable owner of the fund claimed, by operation of law. Cf. *Maryland Surety Company v. United States*, 32 Fed. Supp. 746 (Court of Claims 1940). Even if no refund were involved, the following words of Mr. Justice Murphy, writing for the majority of the Court in the *Wilcox* case, *supra*, would be appropriate, where the victim comes before the court

seeking return of his own money: "Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer." Cf. Mr. Justice Frankfurter, dissenting in *Rutkin v. United States, supra,* that "I just do not think Congress intended to treat the plunder of such criminals as *theirs.*" Certainly where the misappropriated money is to be refunded by the same District Director who collected it in the first place, and taxability to the wrongdoer is no longer the issue, the victim is in equity entitled to recover it, and the District Director is not entitled to retain it.

This Court, in *Philadelphia v. Diehl,* 5 Wall. 720, 733 (1867) said that: ". . . . strong support to the conclusion that the circuit courts have jurisdiction in cases like the present is derived from the several provisions authorizing the removal of such cases from the state courts into circuit courts for trial", further pointing out that the purpose of permitting such suits in the federal courts is to give the federal officer, in this case the District Director, the protection of adjudication in a federal court. If this suit had been instituted in a state court, there is no doubt that the District Director could have removed the entire action under 28 U. S. C. Section 1442, giving support to the conclusion that original jurisdiction also existed in the District Court. The District Director, as stated above, does not contest federal jurisdiction.

In his original opinion in the Court of Appeals, Judge Hastie said that:

> ". . . the kind of action which the law permits against a collector is a personal claim based on his unlawful seizure and appropriation of property for the satisfaction of taxes. The courts have interpreted the law as permitting this personal action even after the collection in controversy has been covered into the Treas-

> ury, and for that reason appropriate provisions are made in such cases for the government to pay the personal judgment against the collector. For present purposes the important thing is that this authority to sue collectors is limited to claims of wrongdoing by the defendant in the exaction or collection of taxes."

But the basis of suits against the District Director (formerly the Collector) is, as previously noted, not limited to unlawful seizure and appropriation of property, or wrongdoing in the exaction or collection of taxes. It is simply an equitable remedy for money had and received. Indeed, even in the case of the United States, it has been held that: "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity, to refund: The form of the indebtedness or mode in which it was incurred is immaterial. . . . In these cases . . . and many others that might be cited, the rules of law applicable to individuals were applied to the United States." *Bull v. United States*, 295 U. S. 247, 261 (1935). This principle is surely applicable where the suit is brought against the District Director, and since it involves his official duties, is properly brought in the federal district court as a case arising under revenue laws of the United States.

II.

The District Court Had Jurisdiction Under 28 U. S. C. Section 2463.

In the District Court Judge Kirpatrick held that jurisdiction existed under 28 U. S. C. Section 2463, conferring jurisdiction on courts of the United States with respect to "all property taken or detained under any revenue law of the United States." Judge McLaughlin, dissenting in the Court of Appeals, agreed. In reversing Judge Kirkpatrick, Judge Hastie, for the majority of the Court of Appeals, said:

"We think this was a mistaken view of the purport of Section 2463. That section is concerned with judicial authority over property, using property in the sense of an identifiable res, a chattel or a particular fund. When there is to be found within a district a chattel or a fund which the federal taxing authorities have seized or are holding there, the statute views this property for jurisdictional purposes as within the custody of the district court for that district and subject to litigation and disposition in that court. In that sense and to that extent Section 2463 is a source of federal jurisdiction . . . But this section has no application whatever where there is no res within the district upon which to found jurisdiction. . . .

"In the present case there is no claim that the money paid by Manu-Mine in 1956 can be traced into any fund now to be found in the Eastern District of Pennsylvania. No doubt the 1956 payment has long since been covered as required by law into the general fund of the Treasury of the United States. There is no claim that any sum has since been withdrawn or segregated for repayment to Manu-Mine. Indeed, it is not even alleged that an effective order or decision directing such repayment has yet been made."

It is respectfully submitted that Judge Hastie's analysis of the claim is not correct. The complaint does claim a detention of petitioner's property in the Eastern District of Pennsylvania, and the complaint does claim that an effective decision directing payment has been made, so that, if the Director is not enjoined, he will make the payment. If a res is necessary under Section 2463, the complaint sufficiently alleges its existence. Paragraph 6 alleges that the tax paid with petitioner's money was paid to the District Director. There is no evidence in the record, contrary to Judge Hastie's assumption, that the payment was covered into the general fund of the Treasury of the United States.

Indeed, even if it had been so paid, it would make no difference. *Stuart v. Chinese Chamber of Commerce of Phoenix, supra.* The fund, which equitably is petitioner's property, is being detained within the jurisdiction by the District Director from petitioner, so that even if there was no original taking within the meaning of Section 2463, there is a present detention sufficient to bring it into operation.

In a case such as this, where the fund at issue arises by reason of the District Director's official duties with regard to the refund of federal income taxes, where the fund rightfully belongs to petitioner, and as such has been received and is about to be repaid by the District Director, and where he is withholding such fund from petitioner only to restore it to the wrongdoer who fraudulently obtained it in the first instance, the District Court does have jurisdiction, since the case arises under the revenue laws of the United States and petitioner's property is being detained under the revenue laws of the United States.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,796

PENNSYLVANIA TURNPIKE COMMISSION

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, PHILADELPHIA,

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,

Appellant

and

SEABOARD SURETY COMPANY,

Appellant.

SUR PETITION FOR REHEARING

Present: McLAUGHLIN and HASTIE, *Circuit Judges;* and MORRILL, *District Judge.*

OPINION OF THE COURT

(Filed June 26, 1959)

PER CURIAM:

The jurisdiction of the federal courts does not rest on any elastic equitable concepts. It can be exercised only

within strict constitutional and even narrower statutory limits which distribute authority and responsibility for redressing wrongs between the national and the local governments in our federated republic. The petition for rehearing shows no persuasive reason for reconsidering our conclusion that the present claim is outside the limited grant of authority under which we act. This, of course, leaves the Turnpike Commission entirely free to invoke the equitable powers of the state courts in an effort to restrain Manu-Mine from disposing of any tax refund it may collect.

McLAUGHLIN, *Circuit Judge*, dissenting.

In the face of the impressive reasons marshaled by plaintiff-appellee in urging our rehearing of this appeal, it is not possible for me to fulfill my responsibility in this case by merely voting for rehearing.

The unusualness of the basis for suit with its necessarily circuitous approach tends to create a natural reluctance to accepting it for the sound, lawyerlike presentation of a worthy claim that it is. It is alleged that plaintiff's money, obtained by fraud, was paid over to the office of defendant McGinnes by the recipient, Manu-Mine. McGinnes has determined the money, as far as he is concerned, should be refunded to Manu-Mine or its assignee and is about to so return it. Plaintiff initially, and sine qua non, prays that McGinnes be restrained from doing that. It asserts its ownership of and its right to the money. That phase of the case will be subject to proof. What needs doing now to prevent a gross miscarriage of justice is to affirm the district court's order sustaining the complaint which allows the plaintiff, if it can, to establish its right to the money.

As a matter of court self respect before we permit the unbelievable act of turning over $900,000, alleged to be the

property of the Pennsylvania Turnpike Commission, to the wrongdoer whose fraud against the Commission created the entire present situation, our full court should at least carefully scrutinize the facts and law involved. If, because of some suggested lack of formalism in its procedure, the State Commission is to be barred by us from the one real chance of recovering its property the decision should be that of the court en banc.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,796

PENNSYLVANIA TURNPIKE COMMISSION

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, PHILADELPHIA,

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY AND SEABOARD SURETY COMPANY,
Appellants.

Present: McLAUGHLIN and HASTIE, *Circuit Judges,* and MORRILL, *District Judge*

ORDER SUR PETITION FOR REHEARING.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

McLaughlin, J., dissents.

Attest:

IDA O. CRESKOFF,
Clerk.

Dated:
June 26, 1959.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,796

PENNSYLVANIA TURNPIKE COMMISSION

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, PHILADELPHIA,

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
Appellant

and

SEABOARD SURETY COMPANY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 16, 1959

Before: McLAUGHLIN and HASTIE, *Circuit Judges;* and MORRILL, *District Judge.*

OPINION OF THE COURT

(Filed June 8, 1959)

By HASTIE, *Circuit Judge.*

This is an interlocutory appeal which has been perfected and allowed as provided by Section 1292 (b) of Title 28, United States Code, as amended by the Act of September 2, 1958, Public Law 85-919, 72 STAT. 1770. The sole

question we consider in reviewing the district court's denial of a motion to dismiss the complaint, is whether the complaint states a claim within federal jurisdiction.[1]

Pennsylvania Turnpike Commission, a corporate agency of the State of Pennsylvania, brought this action in the District Court for the Eastern District of Pennsylvania in an effort to obtain a sum of money, allegedly about to be paid to defendant Manu-Mine Research & Development Co. in refund of an overpayment of Manu-Mine's 1955 federal income taxes. Defendant Seaboard Surety Co. is sued as an assignee of Manu-Mine's claim against the government. Defendant Edgar McGinnes is District Director of Internal Revenue. The complaint alleges that in 1956 Manu-Mine paid more than a million dollars in 1955 federal income taxes, using for that purpose money it had realized by defrauding the plaintiff Turnpike Commission. By reason of such fraud the complaint asserts "that the funds so paid were and are properly the property of the plaintiff." It is further alleged that the defendant Manu-Mine has "recently applied to the office of the defendant McGinnes" for a tax refund of about $900,000. for the taxable year 1955 and that "defendant McGinnes is about to allow the aforesaid claim for refund and to direct its payment to defendant, Manu-Mine and/or defendant, Seaboard." Accordingly, the complaint prays that District Director McGinnes be enjoined from making any 1955 tax refund to Manu-Mine or Seaboard and be directed to pay the Turnpike Commission whatever 1955 tax refund may be owed to Manu-Mine.

This is not a diversity case and the only allegation of a basis of federal jurisdiction is a general claim that "this case arises under the Constitution and laws of the United States, involving the actions of the defendant McGinnes in

1 Defendant Manu-Mine Co. based its motion on lack of jurisdiction and failure to state a case of action while defendant Seaboard Surety Co. asserted the latter ground only. However, regardless of the stated grounds we should and do consider and decide the problem of jurisdiction which affects the entire claim.

his official capacity of District Director of Internal Revenue". On motion to dismiss the district court ruled that this case was within federal jurisdiction by force of the provision of Section 2463 of Title 28, United States Code, that "all 'property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the court of the United States having jurisdiction thereof." 169 F.Supp. 580.

We think this was a mistaken view of the purport of Section 2463. That section is concerned with judicial authority over property, using property in the sense of an identifiable res, a chattel or a particular fund. When there is to be found within a district a chattel or a fund which the federal taxing authorities have seized or are holding there, the statute views this property for jurisdictional purposes as within the custody of the district court for that district and subject to litigation and disposition in that court. In that sense and to that extent Section 2463 is a source of federal jurisdiction. *Ersa Inc. v. Dudley*, 3d Cir. 1956, 234 F.2d 178; *Rothensies v. Ullman*, 3d Cir., 1940, 110 F.2d 590; *Stuart v. Chinese Chamber of Commerce of Phoenix*, 9th Cir. 1948, 168 F.2d 709. But this section has no application whatever where there is no res within the district upon which to found jurisdiction. The essentiality of a res is emphasized by the language of Section 2463 declaring that this statute provides a substitute for the common law remedy of replevin. We commented briefly on the history of this evolution of the old remedy for the distraint of personal property for taxes in *Raffaele v. Granger*, 3d Cir. 1952, 196 F.2d 620. Moreover, in *First National Bank of Emlenton v. United States*, 3d Cir. 1959, 265 F.2d 297, decided March 18, 1959, we recently considered this problem and ruled that Section 2463 is concerned with situations where the matter in controversy is a res within the district where suit is brought.

In the present case there is no claim that the money paid by Manu-Mine in 1956 can be traced into any fund now to be found in the Eastern District of Pennsylvania. No doubt the 1956 payment has long since been covered as required by law into the general fund of the Treasury of the United States. There is no claim that any sum has since been withdrawn or segregated for repayment to Manu-Mine. Indeed, it is not even alleged that an effective order or decision directing such repayment has yet been made. In brief, there is in this case no identifiable property to which jurisdiction under Section 2463 can attach.

More generally, the complaint asserts that this action "arises under the Constitution and laws of the United States", but without specifying what law. At argument it has been urged that this is a suit arising under the federal revenues laws, apparently in the sense that it involves Manu-Mine's alleged claim, presumably asserted under appropriate federal statutes, for a tax refund. But this is not enough to create federal jurisdiction. The plaintiff is not asking the court to decide the merits of any federal right to a tax refund. It is merely alleged that, quite apart from this suit, the government is about to recognize Manu-Mine's claim. The only substantive right plaintiff asserts is an equitable right to the benefit of anything Manu-Mine may collect, and that unquestionably is a local right created by the law of Pennsylvania where the alleged fraudulent imposition of Manu-Mine upon the Turnpike Commission took place. Thus, the federal court is asked, first, to find by applying Pennsylvania law to the Commission's dealings with Manu-Mine that Manu-Mine has wronged it and, second, to authorize what would in substance be a garnishment of a debt said to be owed Manu-Mine by the United States. The first of these matters is entirely a state controversy and the second is an attempted attachment of a debt owed by the sovereign without authorization by any federal law. Thus analyzed, the suit cannot possibly adjudicate the one question which

arises under the internal revenue laws; namely, whether Manu-Mine's claim for refund is allowable. We conclude, therefore, that this is not a claim arising under any law of the United States. *Compare Gully v. First National Bank*, 1936, 299 U.S. 109; *American Well Works Co. v. Layne and Bowler Co.*, 1916, 241 U.S. 257.

In addition, the Turnpike Commission in its brief and argument has made repeated reference to the many cases in which personal actions have been allowed in federal courts against collectors of internal revenue, the predecessors of the present directors, and it has been argued that this is such a suit. But, as pointed out in *United States v. Kales*, 1941, 314 U.S. 186, 197-199, the kind of action which the law permits against a collector is a personal claim based on his unlawful seizure and appropriation of property for the satisfaction of taxes. The courts have interpreted the law as permitting this personal action even after the collection in controversy has been covered into the Treasury, and for that reason appropriate provisions are made in such cases for the government to pay the personal judgment against the collector. For present purposes the important thing is that this authority to sue collectors is limited to claims of wrongdoing by the defendant in the exaction or collection of taxes. Here we have a voluntary payment by Manu-Mine pursuant to what seems to have been its own proper determination of its 1955 income tax. Years later, we are told, by reason of permitted carry back of subsequent losses, a 1955 refund has been claimed by Manu-Mine. There is not the remotest suggestion that the Collector wrongfully collected the 1955 tax. Thus, the decisions permitting suits against collectors for wrongful property seizure and tax collection have no relevance to the present case.

Finally, it has been argued that this case is like *Houston v. Ormes*, 1920, 252 U.S. 469, where the Supreme Court sanctioned a suit against the Secretary of the Treasury to establish a lien upon a fund appropriated

by Congress for payment to an individual. The short answer is that federal jurisdiction was neither necessary nor found to exist in that case. As the Supreme Court recognized, the generally equitable jurisdiction of the District Court of the District of Columbia, analogous to the equitable jurisdiction of a state court, was invoked. Here in Pennsylvania it is the state courts and not any federal court which exercise such jurisdiction. Thus *Houston v. Ormes, supra,* is in no sense controlling.

We can find no basis of federal jurisdiction to support the present case and so conclude that the court below erred in refusing to dismiss the complaint.

The judgment will be reversed with direction to dismiss the complaint for want of jurisdiction.

McLAUGHLIN, *Circuit Judge,* dissenting.

I dissent from the majority opinion for the reasons expressed by Judge Kirkpatrick in his opinion in the district court, 169 F.Supp. 580.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,796

PENNSYLVANIA TURNPIKE COMMISSION

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, PHILADELPHIA, PA.

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY AND SEABOARD SURETY COMPANY,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN and HASTIE, *Circuit Judges*, and MORRILL, *District Judge*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, with direction to dismiss the complaint for want of jurisdiction.

Attest:
IDA O. CRESKOFF,
Clerk.

June 8, 1959.

ILE COPY

Office-Supreme Court, U.S.
FILED
AUG 14 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 223.

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner,

v.

EDGAR A. McGINNES, District Director of Internal Revenue, Philadelphia

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
Respondent,

and

SEABOARD SURETY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1959.

No. 223.

PENNSYLVANIA TURNPIKE COMMISSION,
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EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, PHILADELPHIA

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
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and

SEABOARD SURETY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTION PRESENTED.

Does a United States District Court have jurisdiction of an action by a third party (a) to enjoin a District Director of Internal Revenue from paying a tax refund to a taxpayer pending trial of the third party's claim that, under the doctrine of constructive trust, it would be entitled to the proceeds of the refund when received by the taxpayer; and (b) to direct the District Director to pay the refund to the third party upon a determination that such refund is "due and owing" to the third party from the taxpayer.

STATEMENT OF THE CASE.

Petitioner, Pennsylvania Turnpike Commission, brought this action against Edgar A. McGinnes, District Director of Internal Revenue in Philadelphia ("District Director"), Manu-Mine Research & Development Company ("Manu-Mine"), and Seaboard Surety Company ("Seaboard").

The complaint alleges that in 1956, Manu-Mine paid more than a million dollars in federal income taxes for the taxable year ended October 31, 1955; that the amount so paid was entirely derived from funds obtained by Manu-Mine from petitioner by means of a conspiracy to defraud; that the "funds so paid were and are properly the property of the [petitioner] and do not belong and have not rightfully belonged to Manu-Mine"; that petitioner's claim that the said funds were obtained from it by fraud is presently the subject of a suit in equity in a Pennsylvania State court; that Manu-Mine or its assignee Seaboard have applied to the office of the District Director for an income tax refund claimed to be due to Manu-Mine "the claim amounting to about $900,000"; that the District Director "is about to allow such claim for refund and to direct its payment to [respondent] Manu-Mine and/or [respondent] Seaboard"; that petitioner notified the District Director of its "claim to the fund" but that he has refused to withhold payment pending determination of petitioner's claim.

The complaint prays, *inter alia:* (1) that the District Director "or his successors" be enjoined from making the refund payment; and (2) that the District Director be directed to pay the refund to petitioner "upon a determination that the said funds are justly due and owing" to petitioner from Manu-Mine.

Manu-Mine moved to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted. Seaboard moved to dismiss on the latter ground. The District Director filed an answer denying, among other things, that he is about to allow the claim for refund or to direct its payment to Manu-Mine and/or Sea-

board. The District Court held that it had jurisdiction under 28 U. S. C. § 2463 and further held that the complaint stated a claim upon which relief could be granted. An interlocutory appeal was permitted pursuant to 28 U. S. C. § 1292(b), as amended by the Act of September 2, 1958, 72 Stat. 1770. In an opinion filed June 8, 1959, the Court of Appeals reversed with a direction to dismiss the complaint for want of federal jurisdiction.

ABSENCE OF REASON FOR GRANTING THE WRIT.

This case does not present any important question of federal law requiring settlement by this Court. The only issue posed is whether the complaint states a claim within federal jurisdiction. The legal principles determinative of this question are familiar and long-established as shown by the opinion of the Court of Appeals. We respectively submit that these established principles have been correctly applied in the instant case.

Involved is a dispute between private litigants based not on an existing fact but rather on a hoped-for contingency, namely, that the United States will make a tax refund to Manu-Mine. No aspect of Manu-Mine's right to such tax refund is involved in this case. The petitioner merely contends that if Manu-Mine should be found entitled to a tax refund, then, in that event, the District Director should be enjoined from making such refund while petitioner seeks to establish in a private litigation with Manu-Mine its contention that Manu-Mine committed fraud against petitioner and that therefore the tax refund would constitute the *res* of a constructive trust for the benefit of the petitioner. The petitioner further contends that if it should ultimately succeed in its claim against Manu-Mine, the District Director should be directed to pay over the tax refund to it.

As the Court of Appeals held, the complaint asks the federal court to do two things, namely (1) to find by applying Pennsylvania law that Manu-Mine wronged the petitioner and (2) to authorize the garnishment of a debt al-

leged to be owed to Manu-Mine by the United States. The first is entirely a matter of state law and the second is plainly an attempted attachment of a debt owed by the sovereign without authorization by any federal law. See *Buchanan v. Alexander*, 4 How. 20 (1846); *Applegate v. Applegate*, 39 F. Supp. 887 (E. D. Va. 1941).

We respectfully submit it is indisputable that, as the Court of Appeals held: "* * * this is not a claim arising under any law of the United States".

Finally, it is submitted that there are two additional grounds, which the Court of Appeals found it unnecessary to consider, requiring dismissal for lack of jurisdiction. These are:

1. The District Court lacks jurisdiction to enjoin the District Director from performing an act within the scope of his official authority. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949); and

2. The United States is an indispensable party for two reasons: (a) The suit "* * * is essentially one designed to reach money which the government owns." *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371, 375 (1945); and (b) Delay in making the tax refund, if due, may increase the Government's liability by requiring it to pay interest at the rate of 6% per annum. Int. Rev. Code, § 6611.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DANIEL MUNGALL, JR.,
Counsel for Respondent, Seaboard Surety Company.